



In the matter of Auspine Limited

[2007] ATP 18

Catchwords:

additional disclosure - board recommendation - comparative performance - content of target's statement - corrective disclosure - declined to commence proceedings - deferred tax liability - disclosure in target's statement - independent expert's report- misleading statements - supplementary target's statement - tax implications - total shareholder returns - undertaking to Panel - application dismissed

Corporations Act (Cth) 2001 sections 657A, 657D

Takeovers Panel Guidance Note 16 - 'Correction of Takeover Documents'

SUMMARY

1. These reasons relate to an application to the Panel by Gunns Limited (**Gunns**) dated 24 July 2007 (the **Application**) in relation to its off-market takeover bid for all the shares in Auspine Limited (**Auspine**).
2. Gunns submitted that there were deficiencies in the target's statement dated 12 July 2007 released by Auspine (**Target's Statement**) and in aspects of the Independent Expert's Report which accompanied the Target's Statement (**IER**).
3. Following:
 - (a) the release of specialist reports relied on by the independent expert in the IER;
 - (b) submissions to the Panel and agreed revisions to a draft supplementary target's statement containing additional and corrective disclosures approved by the Panel (along with further information in response to Gunns' takeover offer to which the Panel did not object); and
 - (c) receipt of an undertaking from Auspine that it would send the supplementary target's statement (in the form agreed with the Panel) to Auspine shareholders,the Panel decided not to commence proceedings.
4. The Panel sets out its reasons for this decision below.

THE PANEL & PROCESS

5. The President of the Panel appointed Catherine Brenner, Hamish Douglass (Deputy President) and Ian Ramsay (Sitting President) as the sitting Panel (the **Panel**) to consider the Application.

APPLICATION

Background

6. On 18 April 2007, a group of shareholders in Auspine announced¹ an invitation to tender for the purchase of a parcel of approximately 25% of the ordinary shares in

¹ Including to the market via the exchange operated by ASX Limited.

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Auspine. It was a condition of the tender that the successful bidder then make a takeover bid for the rest of the shares in Auspine at the tender price.

7. Following a tender process, Gunns announced on 15 May 2007 that it was the successful tenderer, and that it would make a takeover bid (**Gunns Offer**) for the remaining Auspine shares (at the successful tender price).
8. The Gunns Offer provided Auspine shareholders with a choice of consideration:
 - (a) **Cash Offer:** \$6.15 for each Auspine share; or
 - (b) **Share Offer:** 1.83 Gunns shares for each Auspine share; or
 - (c) **Combination Offer:** 1.83 Gunns shares for some of their Auspine shares and \$6.15 for the remainder of their Auspine shares.
9. On 13 June 2007 Gunns lodged its bidder's statement with ASIC and ASX and served it on Auspine.
10. Auspine lodged its Target's Statement with ASIC and ASX on 12 July 2007. The Target's Statement:
 - (a) contained a recommendation from the Auspine Board that shareholders reject the Gunns Offer, setting out detailed reasons for the recommendation;
 - (b) made a number of statements with respect to the potential tax implications of the Gunns Offer, and the comparative performance of Gunns and Auspine shares; and
 - (c) annexed an IER prepared by Lonergan Edwards & Associates Limited (**Lonergan**), which relied upon (in part):
 - (i) a valuation of Auspine's plantations undertaken by Poyry Forestry Industry Pty Ltd (**Poyry Report**); and
 - (ii) a valuation of Auspine's land holdings undertaken by Collier's International Consultancy and Valuation Pty Ltd (**Colliers Report**).
11. In the IER Lonergan stated that in its opinion the Gunns Offer was "not fair" but was "reasonable in the absence of a higher offer when assessed based on the guidelines set out in ASIC Policy Statement 75".
12. On 17 July 2007 Gunns issued a first supplementary bidders statement. In summary, the supplementary bidder's statement asserted that the Target's Statement was flawed, and that, amongst other things, Lonergan had made simple errors in calculating the value range for Auspine shares. Gunns submitted that when these errors were corrected, the Gunns Offer would fall within the range determined by Lonergan in its IER as being fair and reasonable.
13. On 24 July 2007, after commercial discussions between the parties remained unresolved, Gunns lodged the Application. Gunns submitted that there were:
 - (a) misleading statements in, and omissions from, the Target's Statement; and

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- (b) flaws in the IER, several of which would have the effect of bringing the Gunns Offer within the valuation range determined by Lonergan as being ‘fair and reasonable’².

Declaration and orders sought in the Application

14. Gunns sought a declaration of unacceptable circumstances under section 657A of the Corporations Act³, and orders pursuant to section 657D requiring Auspine to:
 - (a) release each specialist report commissioned by Auspine and relied upon by Auspine in its Target’s Statement and by Lonergan in preparing its IER;
 - (b) commission an updated independent expert report rectifying the IER; and
 - (c) issue a supplementary target’s statement in the form approved by the Panel.

Auspine Response

15. In response to the Application, Auspine made initial submissions as to why the Panel should decline to commence proceedings.
16. In summary, Auspine submitted that none of the issues raised in the Application involved misleading statements or omissions. Further, to the extent that statements in the Target’s Statement were inaccurate, such inaccuracies were immaterial. It also:
 - (a) agreed to release the Poyry Report and Colliers Report ‘*in the interests of full disclosure*’;
 - (b) confirmed that the alleged flaws in the IER had been raised with Lonergan, which rejected the contentions raised by Gunns and remained of the view that the valuation range set out in the IER was appropriate; and
 - (c) provided the Panel with a draft supplementary target’s statement (**DSTS**), submitting that “*to the extent that the Target’s statement could be considered misleading, the Supplementary Target’s Statement will address those issues.*”

DISCUSSION

Issues

Initial Auspine Submissions

17. Having reviewed the Application and initial submissions of Auspine, the Panel considered that a number of the issues raised in the Application:
 - (a) were addressed by Auspine in releasing the Poyry and Colliers Reports; or
 - (b) were either adequately addressed in the DSTS provided to the Panel with the initial submissions, or could be generally dealt with in a supplementary bidder’s statement.

² As noted above, the IER concluded that Gunns Offer was not fair but was reasonable in the absence of a higher offer when assessed based on the guidelines set out in ASIC Policy Statement 75.

³ Unless otherwise stated, all statutory references are to the Corporations Act.

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18. However, the Panel identified a number of matters it considered could potentially give rise to unacceptable circumstances under section 657A.
19. Rather than commencing proceedings, the Panel considered that it may be possible in this case to resolve matters through the DSTS. To facilitate this, the Panel advised the parties as to the aspects of the Application it considered may give rise to unacceptable circumstances, and:
 - (a) requested Auspine to prepare a revised DSTS addressing the identified matters, and to provide the Panel with the revised DSTS along with any necessary submissions to explain the proposed revisions; and
 - (b) confirmed that Gunns would have an opportunity to comment on any revised DSTS prepared by Auspine, and to make submissions prior to the Panel determining whether to commence proceedings.
20. During the course of the process adopted by the Panel, each party identified further matters it submitted gave rise to disclosure obligations, or which required corrective disclosure by the other party. Some of these stemmed from additional information Auspine proposed to disclose in the DSTS. As a consequence, the range of matters ultimately considered by the Panel was broader than that set out in the Application.
21. While the Panel considered each of the matters raised, these reasons do not identify and address each issue before the Panel. As noted above, the Panel considered that some of the issues raised would be addressed by Auspine's proposed supplementary target's statement, or were unlikely to give rise to a declaration of unacceptable circumstances. Accordingly, they were not the subject of detailed discussion; these reasons focus upon what the Panel considered to be the key issues raised in the Application.

Statements regarding deferred tax liability

22. In both the Target's Statement and IER a number of statements were made with respect to the 'value' of Auspine's deferred tax liability (**DTL**) to Gunns in the event that Gunns were to acquire 100% of Auspine. Gunns submitted that a number of these statements were either misleading or incorrect. Gunns submitted that if the DTL benefit was removed from the Lonergan valuation then the Gunns Offer fell within the IER range of fair and reasonable.
23. The Panel sought clarification from Auspine in respect of the following issues:
 - (a) why Auspine's chairman had stated in the Chairman's letter accompanying the Target's Statement that Gunns would receive an immediate tax benefit equal to \$74.2 million on acquisition of 100% of Auspine, and that this was worth \$1.38 per Auspine share, when Lonergan had discounted the net present value of Auspine's deferred tax liability (to a purchaser such as Gunns) to between \$9 million and \$16.5 million in the IER, and had included that amount as a component of its assessed value of Auspine shares;
 - (b) whether under the current tax regime a purchaser of 100% of Auspine would be able to restate the tax cost base of all assets acquired such that the company's deferred tax liability would be substantially reduced (or possibly eliminated), or

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whether a restatement of this nature was dependent on future changes (albeit foreshadowed) to the tax legislation;

- (c) whether under proposed changes to the tax regime a purchaser of 100% of Auspine such as Gunns which intended to retain the land and use it rather than selling it, would be able to restate the tax cost base of all assets acquired such that the company's deferred tax liability would be substantially reduced (or possibly eliminated) and would be able to realize the value of any restated tax cost base.

24. On the first issue, Auspine submitted that:

- (a) if Gunns were to acquire 100% of Auspine, the company would become part of Gunns' consolidated group under the tax consolidation regime with the result that the tax base of the assets of Auspine would be restated;
- (b) as a consequence of any increase in the tax base of an asset, the associated DTL would be reduced or possibly eliminated;
- (c) if, as a consequence of any increase in the tax base of an asset, the liability was eliminated entirely, it would equate to an increase in the net tangible assets of Auspine for accounting purposes equivalent to \$1.38 per Auspine share;
- (d) the value attributed to Auspine's deferred tax liability by Lonergan in the IER was provided in the context of a share valuation exercise, which was entirely different to the value Gunns would receive if it acquired 100% of Auspine and could eliminate the DTL from the Auspine balance sheet.

25. The Panel considered that in circumstances where the independent expert had attributed a discounted present value to Auspine's DTL of \$9 - \$16 million and factored that into the valuation of Auspine shares, a statement which:

- (a) implied an immediate value of \$74.2 million to Gunns if it acquired 100% of Auspine; and
- (b) implied that gaining 100% and eliminating the DTL was worth an additional \$1.38 per Auspine share,

would be misleading.

26. Accordingly, the Panel required that such statements be clearly withdrawn by Auspine. Further, the Panel required that the corrective disclosure state the discounted value attributed to the DTL by Lonergan, and clarify that the value had been incorporated in the value attributed to Auspine shares in the IER.

27. On the second and third issues, Auspine submitted that it had received expert advice that its statements with respect to Gunns' ability to restate the tax costs base were correct under both the current and prospective tax regimes.

28. The Panel concluded that the matter⁴ was one capable of differing views by experts. The Panel noted that:

⁴ Whether under the current or proposed tax regimes a purchaser of 100% of Auspine would be able to restate the tax cost base of all assets acquired such that the company's deferred tax liability would be substantially reduced (or possibly eliminated).

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- (a) Auspine submitted it had obtained expert advice that went against the submissions of Gunns; and
- (b) it was properly open to Gunns to publish evidence to persuade Auspine shareholders as to what Gunns maintained to be the ‘correct’ position.

Inclusion of period from 18 April 2007 in Total Shareholder Return calculations

- 29. In its Target’s Statement, Auspine stated that it had ‘clearly outperformed Gunns for the last two years, delivering greater returns to Auspine Shareholders than received by Gunns Shareholders’. Auspine also included graphs comparing the ‘2 Year Total Shareholder Returns’ of Gunns and Auspine shares.
- 30. Gunns submitted that inclusion of the period after 18 April 2007 in the comparative calculation of total shareholder returns provided a misleading result because of the significant increase in Auspine’s share price following the announcement on 18 April 2007 of the tender process for 25% of Auspine’s shares. Gunns submitted that the increase in Auspine’s share price was largely the result of takeover speculation stemming from announcement of the tender, and the condition that the successful tenderer make a full takeover bid for Auspine. As such, Gunns submitted, they should not be considered as returns generated by current Auspine management or representative of the performance of Auspine shares in the absence of the Gunns Offer.
- 31. In fact the Auspine share price moved from \$3.63 on 18 April prior to the announcement to a high of \$4.34 on 20 April following the announcement, prompting an ASX request for confirmation of the company’s continuous disclosure compliance. In response, Auspine advised ASX that:
‘The announcement of the tender and speculation in the media about a takeover, are the only explanations the company can offer for the increase in share price and volume that has occurred on 19 and 20 April 2007.’
- 32. The Panel considered that inclusion of the value of the movements of Auspine’s and Gunns’ share prices in the post-tender period gave a misleading result for the calculation of comparative total shareholder returns.
- 33. Accordingly, the Panel required Auspine to restate the comparative return analysis using 18 April as the cut-off date.
- 34. The Panel also requested Auspine to provide an explanation as to why it should, or should not, disclose to Auspine shareholders the effect of including or excluding the period after 18 April in its calculation of comparative total shareholder returns.
- 35. Auspine submitted that it was appropriate to include the period post 17 April (the tender was announced on 18 April) as:
‘Gunns paid a dividend on 5 April 2007 and Auspine’s shares became ex-dividend on 27 April 2007. It is fair and appropriate that payment of the dividend by each company in April 2007 be included in a comparison.’
- 36. The Panel did not accept that ending the comparison period prior to the announcement of the Auspine dividend on 27 April 2007 would unfairly or adversely affect the Auspine TSR.

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37. The Panel determined that a comparison of shareholder returns which included price rises in Auspine shares following the announcement of the tender offer was likely to be misleading. While it was open to Auspine to choose additional, different periods, the Panel considered that:
- (a) the primary period of comparison should end prior to the announcement of the tender process on 18 April 2007;
 - (b) any comparison for a period which extended past the announcement of the tender process on 18 April should clearly explain the effect of the announcement on 18 April on any TSR value, in similar terms to that used by Auspine in response to the ASX query referred to in paragraph 31 above; and
 - (c) once the period post 17 April 2007 was removed from the TSR calculations, it would be misleading to state that Auspine had outperformed Gunns over the previous two years. Accordingly, existing statements to that effect should be clearly and expressly corrected by Auspine.

Insufficient emphasis placed on 'reasonable' finding in Lonergan report given the emphasis on 'not fair'

38. As previously noted, in the IER Lonergan stated that the Gunns Offer was “not fair” but was “reasonable in the absence of a higher offer when assessed based on the guidelines set out in ASIC Policy Statement 75”. Lonergan also gave four reasons as to why it considered the Gunns Offer to be reasonable in the absence of a higher offer.
39. In its Target’s Statement and other disclosures, especially in the initial “selling” part of the Target’s Statement, Auspine placed significant emphasis on Lonergan’s conclusion that the Gunns Offer was ‘not fair’. However, Auspine made only one, footnote reference to Lonergan’s conclusion that the Gunns Offer was reasonable in the absence of a higher offer, and did not address any of the four reasons that Lonergan put forward for its view on reasonableness. Gunns submitted that this, combined with the fact that the Target’s Statement did not reflect that the Gunns Offer was only A\$0.06 below the fair value range determined by Lonergan, was misleading and deceptive.
40. Auspine maintained that Auspine shareholders were appropriately informed as:
- (a) reference had been made in the Target’s statement to the finding by Lonergan with respect to the reasonableness of the Gunns Offer;
 - (b) the complete IER was both released to ASX and appended to the Target’s Statement; and
 - (c) Auspine had stated in an ASX release that: *‘Lonergan Edwards also assessed the offer as reasonable because, among other things, the value is only marginally below the low end of their range’.*
41. The Panel considered that the Target’s Statement did not provide a balanced summary of Lonergan’s conclusion in the IER, noting that:
- (a) the words “not fair” were frequently printed in red, in larger, bold font and capitalised, whereas the word “reasonable” in the phrase “not fair but reasonable” was consistently in lower case, and in some cases in a smaller font;

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- (b) the words “not fair” were used by themselves ten times in the Target’s Statement (excluding the expert’s report) without reference to the expert’s opinion that the Gunns Offer was “reasonable in the absence of a higher offer”. The Target’s Statement contained only one footnoted reference to the expert’s opinion that the Gunns Offer was “reasonable”;
 - (c) the expert gave four reasons for considering that the Gunns Offer was reasonable in the absence of a higher offer, but the Target’s Statement did not mention any of them.
42. Accordingly, to remedy the misleading impression that the Target’s Statement had given, the Panel required that the DSTS make Lonergan’s full view as to the fairness and reasonableness of the Gunns Offer clear to Auspine shareholders.
43. The Panel also required that the corrective statement be of equal prominence to the director’s opinion as to the fairness and reasonableness of the Gunns Offer.

Valuation of sawmill business above directors valuation without explanation

44. Gunns submitted that in Auspine’s most recent half-year accounts, Auspine’s directors wrote down the value of the company’s Tasmanian wood products business by 45% to \$22.1 million, because of the loss of its previous wood supply arrangements. However, without explanation (as Gunns submitted), Lonergan in the IER valued the business at A\$29.9 million to \$32.8 million, a range that was 35% to 48% higher than the assessment by the Auspine board in the half-year accounts.
45. The Panel was concerned that:
- (a) given the detailed process to be undertaken by directors when conducting impairment testing, further clarification as to the reasons behind the higher valuation attributed to the sawmill business by the independent expert was required; and
 - (b) the reasons for the difference in value attributed to the business by Auspine’s directors in the most recent half-year accounts as compared to Lonergan in the IER should be explained to Auspine shareholders in the DSTS.
46. Auspine advised that, subsequent to the impairment testing for the purposes of the half-year accounts, the company had entered into arrangements to secure log supply for the Tasmanian wood products business. Accordingly, the FY08 forecast significantly exceeded the original forecast, and Lonergan had been advised of the improved outlook (which had been taken into account when preparing the IER).
47. Auspine also advised that Lonergan had:
- (a) adopted different methodology from that employed with respect to the December 2006 asset impairment testing, and this methodology was clearly explained in the IER; and
 - (b) confirmed its assessed value of the business was appropriate.
48. In light of the Auspine submissions on this point and the additional disclosure proposed in the DSTS, the Panel considered that the issue was one capable of being addressed by Gunns and Auspine in communications to Auspine shareholders if either or both wished to do so in clear and non-misleading manners.

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“Errors” in IER

49. As a threshold issue, the Panel considered whether, in the absence of evidence of manifest error, it was appropriate for the Panel to question the conclusions reached by an independent expert.
50. The Panel did not accept Auspine’s submission that, in the absence of manifest error or bias, it should not review or overturn the methodology adopted or conclusion reached by an independent expert. Rather, the Panel considered that whether such questioning was appropriate would turn in each case on the relevant facts.
51. The Panel considered that while there may be circumstances in which such questioning would be appropriate, in this instance, there was no material before the Panel to suggest that Lonergan had not been provided with relevant information, or that the conclusions reached suggested a manifest error in determining a valuation range for Auspine shares. Further, the Panel considered that the explanations provided by Lonergan (and set out by Auspine in the DSTS) in response to Gunns’ assertions that simple errors had been made in calculating the value range were reasonable, and the Panel considered that the issues had been properly considered and dismissed by Lonergan.
52. Accordingly, the Panel concluded that the issues between the parties in this respect were matters on which experts might validly disagree, and hence were suitable for discussion or argument between bidder and target in their respective documents.

Recent ASX trading

53. In an early draft of the DSTS, Auspine stated that Auspine shares had traded above the Gunns Offer price since 15 May 2007.
54. The Panel considered that the statement was misleading unless it also clearly set out the facts of Mr Adrian de Bruin's⁵ series of Auspine share acquisitions during the relevant period, including the proportion of market trading which those acquisitions had constituted. Alternatively, the Panel advised Auspine that it may choose to make no reference in the DSTS statement, or in future communications to Auspine shareholders, concerning current market prices of Auspine shares or promoting the current market price as an alternative to accepting the Gunns Offer.

Disclosure as to the status of other potential bidders

55. In the Target's Statement, Auspine advised that it had initiated a due diligence process which it hoped would result in a bid that reflected the real value of Auspine. Auspine made further reference to potential alternative bidders in communications with Auspine shareholders (for example a letter to Auspine shareholders on 9 July 2007). Gunns requested that the Panel require Auspine to make disclosure in the DSTS as to the progress of Auspine’s attempts to find alternative bidders.
56. The Panel required Auspine to make further clear and neutral disclosure as to the status of the due diligence enquiries by two other parties to whom Auspine had allowed access, and its knowledge of their intentions with regard to possible alternative bids.

⁵ Auspine’s managing director, and a substantial shareholder in the company.

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Additional disclosure material in the DSTS

57. Auspine asked the Panel whether it objected to Auspine including information in the DSTS additional to the corrective disclosure required by the Panel. The Panel advised Auspine that it did not object to the additional material as long as it did not detract from the clear corrective message of the information required by the Panel.

“The only offer available to accept”

58. Auspine submitted that a statement by Gunns that the Gunns Offer was “*the only offer available to accept*” was misleading, in that it appeared to negate the possibility of any other offers being made.

59. The Panel advised Gunns that if Gunns wished to make a statement about the Gunns Offer being the only offer available to accept in any future statements, it should state:

- (a) that the Gunns' Offer was the only offer *currently* available to accept - the Panel considered that as Auspine had stated publicly it was allowing two potential alternative bidders to conduct due diligence enquiries, such a qualification was appropriate; and
- (b) the current market price of Auspine shares if it was materially higher than the Gunns Offer at the time of the statement.

The Panel considered that it would be open to Gunns to make reasonable and not misleading statements concerning the risks of future prices on ASX not being the same as the current market prices.

DECISION

60. For the reasons set out above, the Panel considered that some of the issues raised in the Application would, if not addressed by the additional and corrective disclosure, have given rise to a declaration of unacceptable circumstances under section 657A.

61. Given the corrective material considered necessary by the Panel, the Panel considered that the supplementary target's statement to be issued by Auspine needed to meet the standards set out in the Panel's Guidance Note 16 on corrective statements.

62. In light of:

- (a) the publication by Auspine of the Poyry and Colliers reports;
- (b) the additional and corrective disclosure proposed by Auspine in its revised DSTS; and
- (c) the undertaking from Auspine that it would send the supplementary target's statement to Auspine shareholders,

the Panel declined to commence proceedings.

Ian Ramsay
President of the Sitting Panel
Decision dated 8 August 2007

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Reasons published 13 September 2007